

# **Institutional Actors and State Death Penalty Laws**

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By  
Derek Whiddon

The Ohio State University  
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Project Advisor: Dr. John Wright, Department of Political Science

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## **Introduction**

Numerous studies and theories have been devoted to answering questions surrounding voting in legislative settings and voter choice on Election Day. A legislator is faced with balancing the role of a delegate with the role of a trustee in the legislature, weighing votes based on both their conscience and the wishes of their constituents. Sometimes legislators do not consider either of these, as they are pressured to “toe the party line” on major legislative issues. What happens when a bill on the floor causes all of these different pressures to collide, particularly on an issue as contentious as the death penalty? After the *Furman v. Georgia* decision in 1972, states had to deal with decisions on reinstating capital punishment laws struck down by the Supreme Court. Most of the changes states have made to their death penalty statutes since *Furman* have come from legislative action, but a situation arose in Washington in 1975 in which the death penalty was reinstated via popular vote after the legislature had refused to pass a new capital punishment statute. A similar situation occurred in 2015 in the state of Nebraska, when for the first time, the state legislature succeeded in repealing the state’s capital punishment statute over the governor’s veto. Both the majority of the Nebraska legislature and the governor are Republicans, and the state which they serve is known to be generally conservative. The voters made their displeasure with the legislature known the following November, after a ballot referendum challenging the legislature’s abolition of the death penalty resulted in the voters deciding to overrule the legislature and uphold the state’s death penalty system. The events in Washington in 1975 and Nebraska in 2015 will be the subjects of this paper.

This paper will examine the possible factors that could explain the Nebraska and Washington legislatures’ actions on death penalty policy as well as the apparent divide between the legislatures and their constituents on the issue. With the help of legislative records,

newspapers, and Krehbiel's pivotal politics model, the legislative history and votes on the death penalty bills will be examined to determine why the legislatures would enact such broad changes on a controversial issue that did not seem to have been supported by their constituents. In addition, election return data from the ballot questions will be used to compare constituent votes on death penalty policy with the votes of their legislators. The anticipated outcome of this analysis is that through the pivotal politics model, ideology will be shown to be the main factor in determining votes on death penalty policy. In addition, the election returns should indicate that on a district level, public opinion on the death penalty was incongruent with the actions of the state legislators.

### **Background**

#### *The Death Penalty and Furman v. Georgia*

The death penalty has existed in the United States since the time of the Revolution, and it had been present in the British colonies in North America as a part of British law (Scafidi 1973, pp. 682-683). While calls for abolition of the death penalty predated the formation of the United States, the first major abolition movement took hold in the mid to late 19<sup>th</sup> century as Maine, Michigan, Rhode Island, and Wisconsin all abolished the death penalty before 1890 (Scafidi 1973, pp. 683-685). The state of Iowa abolished the death penalty in 1872, but this decision was reversed in 1878 (Scafidi 1973, pp. 683-685). In 1897, Congress reduced the federal death penalty to cases of murder, rape, and treason (Scafidi 1973, p. 685). From 1890-1920, eight more states abolished the death penalty, but five states would reinstate the death penalty before the *Furman* decision (Scafidi 1973, p. 685). In 1964, New York limited and Oregon abolished the death penalty in their respective states, the final two states to do so before 1972 (Scafidi 1973, p. 685).

Furman had been convicted of murder and sentenced to death in Georgia after an attempted burglary ended with a shot being “fired through a closed door when Furman, running away, tripped over a wire” (Scafidi 1973, p. 697). Two other defendants sentenced to death for rape, one from Georgia and one from Texas, had their cases consolidated and heard on appeal with Furman’s by the Supreme Court (Scafidi 1973, pp. 697-698). In the case of *Furman v. Georgia*, the Court decided 5-4 that the death penalty applied in these cases was unconstitutional (*Furman v. Georgia* 1972, further *Furman*). The opinion issued in the case was per curiam, with each of the five justices in the majority issuing their own opinions (*Furman*). In the per curiam opinion, the Court ruled that the death penalty as applied in these three cases “constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments” (*Furman*, at 240). Justice Stewart was careful to note that despite the opinions of Justices Brennan and Marshall, the constitutionality of the death penalty itself was not under the purview of this decision, and the Supreme Court has never ruled that the death penalty is *per se* unconstitutional (*Furman*, at 308). What the majority had agreed was unconstitutional had been the death penalty as it was currently practiced, especially granting great latitude to juries that had caused the death penalty to be “so wantonly and so freakishly imposed” (*Furman*, at 310). Justice Douglas also noted, citing a report from the President’s Commission on Law Enforcement and Administration of Justice, that the death penalty had been “disproportionately imposed, and carried out on” poor and minority defendants (*Furman*, at 249-250).

The immediate effect of the *Furman* decision was to commute the death sentences of the three defendants petitioning the case. However, the decision effectively nullified death penalty statutes across the country, as the death penalty as currently practiced in the states had been found unconstitutional. The states then had the task of deciding whether or not to reinstate the

death penalty without much guidance in the *Furman* opinions as to what framework for capital punishment the Court would deem constitutional. Nine states had abolished the death penalty before the *Furman* decision, and one state, North Dakota, did not reinstate its death penalty after it was struck down by the Court in 1972 (Death Penalty Information Center, further DPIC). Instead, the North Dakota Legislature repealed the remnants of the death penalty from state law in 1973 (DPIC). The remaining 40 states reinstated their death penalty laws at some point after the *Furman* decision, and the process and timing of reinstatement of the death penalty varied from state to state.

Table 1 presents the dates and methods of reinstatement used by the states to institute new death penalty laws following the *Furman* decision:

**Table 1**  
**Timing and Methods of State Death Penalty Reinstatement After *Furman v. Georgia***

State	Year of Reinstatement	Method of Reinstatement
Alabama	1976	Legislative action
Arizona	1973	Legislative action
Arkansas	1973	Legislative action
California	1974	Constitutional amendment by voter initiative, then legislative action
Colorado	1975	
Connecticut	1973	Legislative referendum, approved by voters
Delaware	1974	Legislative action
Florida	1972	Legislative action
Georgia	1973	Legislative action
Idaho	1973	Legislative action
Illinois	1974	Legislative action
Indiana	1973	Legislative action
Kansas	1994	Legislative action
Kentucky	1975	Legislative action
Louisiana	1973	Legislative action
Maryland	1978	Legislative action
Massachusetts	1982	Legislatively referred constitutional amendment, passed by voters
Mississippi	1974	
Missouri	1975	Legislative action
Montana	1974	Legislative action
Nebraska	1973	Legislative action

Nevada	1973	Legislative action
New Hampshire	1991	Legislative action
New Jersey	1982	Legislative action
New Mexico	1979	Legislative action
New York	1973	Legislative action
North Carolina	1977	Legislative action
Ohio	1974	Legislative action
Oklahoma	1973	Legislative action
Oregon	1978	Ballot initiative
Pennsylvania	1974	Legislative action
Rhode Island	1973	Legislative action
South Carolina	1974	Legislative action
South Dakota	1979	Legislative action
Tennessee	1974	Legislative action
Texas	1974	Legislative action
Utah	1973	Legislative action
Virginia	1975	Legislative action
Washington	1975	Ballot initiative
Wyoming	1977	Legislative action

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Source: DPIC

The overwhelming majority of states reinstituting the death penalty did so through legislative action. There were five states, however, where popular votes were used to pass new death penalty laws. In two of those states, Colorado and Massachusetts, the state legislatures referred legislation and a constitutional amendment, respectively, which the voters in each state passed. In California, a 1972 state Supreme Court decision ruled the state's death penalty statute unconstitutional under the state constitution (DPIC). An initiative petition placed a state constitutional amendment on the ballot to declare the death penalty constitutional in California, and voters overruled the state supreme court and passed the amendment in November 1972 (DPIC). The legislature would enact a new death penalty law under this amendment in 1977 (DPIC). In two states, Oregon and Washington, ballot initiative petitions were used to reinstate each state's death penalty system.

Many of the 40 states which reenacted their death penalty statutes after the *Furman* would soon alter their statutes again, some due to state courts finding the laws unconstitutional and others due to legislative alterations to the statutes. In 1976, the U.S. Supreme Court would again hear a case involving Georgia's death penalty law, this time to determine whether the new framework for death penalty statutes adequately addressed the issues raised in *Furman*. While five cases involving five separate state death penalty laws were announced in 1976, the case of *Gregg v. Georgia* is the historically important case for the Supreme Court's interpretation of the death penalty's constitutionality after *Furman* (*Gregg v. Georgia* 1976, further *Gregg*). In upholding Georgia's death penalty statute, the Court held that the Georgia law's provisions requiring the jury to take into account the "character or record" of individual defendants, required the jury to find at least one aggravating factor in a crime, and required automatic appellate court review to protect against "random or arbitrary imposition of the death penalty" made the law constitutional and adequately addressed the issues in *Furman* (*Gregg*, at 206-207). This ruling provided a framework for the states on structuring a constitutional death penalty system. The Court did not uphold all of the death penalty laws that came before it in 1976, and in *Woodson v. North Carolina* the Court ruled that mandatory death sentences were unconstitutional (*Woodson v. North Carolina* 1976).

Since 1976, the Court has made numerous changes to its death penalty jurisprudence, such as preventing the exclusion of potential jurors based on race and prohibiting the execution of defendants under the age of 18 (*Batson v. Kentucky* 1986; *Roper v. Simmons* 2005). In addition, the Court has held that the execution of intellectually disabled is unconstitutional, and it has prohibited the use of outdated medical standards in assessing a defendant for intellectual disability (*Atkins v. Virginia* 2002; *Moore v. Texas* 2017). The *Furman* and *Gregg* decisions in



the 1970's were two of the most important Supreme Court cases ever heard on criminal punishment, and the additional cases listed, among others, have helped shape how the death penalty is practiced in the United States. In the time since the *Gregg* decision, nine states that had reinstated the death penalty and are shown in Table 1 have abolished it in their states through either legislative action or state Supreme Court decisions. Table 2 lists the dates and methods of abolition in these states:

**Table 2**  
**Timing and Methods of State Death Penalty Abolition After *Furman v. Georgia***

State	Year of Abolition	Method of Abolition
Connecticut	2012	Legislative action
Delaware	2016	Legislative action
Illinois	2011	Legislative action
Maryland	2013	Constitutional amendment by voter initiative, then legislative action
Massachusetts	1984	Legislative referendum, approved by voters
New Jersey	2007	Legislative action
New Mexico	2009	Legislative action
New York	2004	Legislative action
Rhode Island	1984	Legislative action

Source: DPIC

Two interesting occurrences involving state death penalty laws since the *Furman* decision are described below. In 1975, the state of Washington attempted to reinstate its death penalty statute for the second time since the *Furman* decision. Disagreement among the state House of Representatives and state Senate resulted in the citizens settling the debate via ballot initiative. In 2015, an effort by the legislature of Nebraska to repeal the death penalty led to a legislative showdown with the governor that had to be settled by voters via a referendum in November 2016. These situations can provide insight into legislative voting decisions on death penalty issues as well as other topics such as the legislator-constituent relationship.

*Washington*

The forty-fourth Washington Legislature convened for its first session on January 13, 1975 (*House Journal of the Forty-Fourth Legislature*, p. 1, further *House Journal*). Washington has an interesting structure for its bicameral state legislature. Representatives and senators are elected from the same districts and constituencies, with each of the 49 legislative districts electing two members of the House of Representatives and one member of the Senate (Washington State Legislature). On the day the session opened, two bills were introduced that sought to reinstate the death penalty in the state of Washington. House Bill 80 (HB80) and Senate Bill 2007 (SB2007) both sought to reinstate the death penalty in Washington for certain cases of first degree murder (*House Journal*, p. 20; *Senate Journal: Forty-Fourth Legislature*, p. 41, further *Senate Journal*). The mentions of HB80 in the legislative record are few, and the bill does not appear to have gained much traction in the House. On April 11, 1975, HB80 was reported as a substitute bill and referred to the House Committee on Rules to schedule it for second reading (*House Journal*, p. 852). This appears to be where the bill was stopped, as there is no further mention of it in the House Journal.

In the Senate, SB2007 had much greater success than HB80 had in the House. On April 1, 1975, the bill was reported from the Senate Judiciary Committee with the majority recommending passage, and the bill was sent to the Senate Committee on Rules to schedule the second reading (*Senate Journal*, p. 869). On April 18, 1975, after numerous amendments were considered to the bill, SB2007 passed the Senate by a vote of 33-14, with two members excused (*Senate Journal*, pp. 1008-1015). SB2007 contained a clause that would have automatically placed the bill before voters in the form of a referendum on the November 1975 ballot (United Press International, April 20, 1975, further UPI). The bill was passed alongside a companion bill,

which would make life imprisonment the maximum penalty for murder and also contained a provision for a referendum (UPI, April 20, 1975). The passage of both of these bills would have allowed the people to decide in two referenda whether life imprisonment or the death penalty should be the maximum sentence in the state, and if both referenda would have passed, the vote on the death penalty would override the vote on life imprisonment (UPI, April 20, 1975). A referendum of SB2007 would have made the death penalty the sentence for “killing a uniformed policeman or fireman, mass murders, murder for hire, killing to cover up another crime, murder in connection with rape, or murder committed by an inmate serving a life sentence” (UPI, April 20, 1975).

The House received the Senate-passed version of SB2007 on April 21, 1975, and the bill was sent to the Judiciary Committee (*House Journal*, p. 936). On May 7, 1975, the House Judiciary Committee reported the bill, and it was sent to the Committee on Rules to schedule for second reading (*House Journal*, 1213-1214). The version of the bill passed by the committee was significantly different than the bill passed by the Senate, as the reported bill would have made the death penalty mandatory in the case of murder only for inmates currently serving a life sentence (UPI, May 8, 1975). In the other cases originally stated in the bill, such as killing a law enforcement officer, the committee changed the maximum sentence to life without parole (UPI, May 8, 1975). When the bill reached the floor, the coalition that supported the bill was similar to the one that had supported HB80. Unlike HB80, however, SB2007 never received a vote on final passage on the House floor. Instead, opponents were able to use a procedural vote to prevent its passage. On May 20, 1975, a vote was taken to refer SB2007 back to the House Committee on Rules, and this vote passed 58-37 with three members not voting (*House Journal*, p. 1357). This vote effectively killed the bill, and it marked the second time since the *Furman* decision that the

House refused to pass Senate-approved legislation reinstating the death penalty in Washington (Brazier pp. 23-27).

Reports from the *Seattle Times* indicate that Representative Tilly, one of the co-sponsors of HB80, may have been anticipating the House's refusal to pass a bill reinstating the death penalty. On March 16, 1975, it was reported that Representative Tilly was planning a petition drive to place an initiative on the November that would reinstate the death penalty in Washington (Associated Press, March 16, 1975, further AP). Tilly cites legislative inaction on the death penalty as one of the reasons for the initiative, and the article also cites that Governor Dan Evans had long been an opponent of the death penalty, making him likely to have vetoed any proposed reinstatement (AP, March 16, 1975). After waiting to see how the legislature handled several criminal justice bills, Tilly and his supporters began petitioning on a large scale on June 6, 1975 (Zahler, 1975). One month later, on July 6, 1975, it was reported that the Washington Secretary of State's Office had accepted the petition and verified enough signatures to place the reinstatement of the death penalty on the November 1975 ballot as Initiative 316 (AP and UPI, July 6, 1975). On November 4, 1975, voters in Washington passed Initiative 316 and reinstated the death penalty by a vote of 69.1% in favor and 30.9% against (Secretary of State, State of Washington).

### *Nebraska*

In January 2015, the 104<sup>th</sup> Nebraska Legislature opened for its first session. Nebraska's legislature is unique among state legislatures in the United States. Not only is it the only non-partisan state legislature in the United States, but it is also the country's only unicameral state legislature (Clerk of the Legislature 2014, p. 247). Despite being elected on non-partisan ballots,

party registration among state senators in 2015 put the party balance of the 49 members at 35 Republicans, 13 Democrats, and 1 Independent (NET 2015). On January 14, 2015, State Senator Ernie Chambers, the only independent senator in the legislature, introduced bill number LB268 which sought to change the maximum criminal sentence in Nebraska from death to life imprisonment without parole (104<sup>th</sup> Nebraska Legislature, p. 154, further *Legislative Journal*). After a large number of amendments were considered to the bill, LB 268 passed the legislature on May 20, 2015 by a vote of 32-15-2 (*Legislative Journal*, p. 1739).

Six days later, on May 26, 2015, Republican Governor Pete Ricketts vetoed the bill and returned it to the legislature without approval (*Legislative Journal*, pp. 1869-1871). In his veto message, the governor argued that the state would not be saving a significant amount of money from eliminating the death penalty system, and he cited support from the “overwhelming majority of Nebraskans who support the death penalty” as a factor in his decision (*Legislative Journal*, p. 1869-1871). The legislature met the following day, May 27, to consider a vote to override the governor’s veto. Despite the objections of the governor, the legislature voted 30-19 to override the veto of LB268, with 16 Republicans voting to override (*Legislative Journal*, pp. 1896-1897). The two Republican senators who had originally voted “present” on LB268 voted “no” on the override vote, and two Republican senators who had voted “yes” on LB268 switched their vote to “no” for the override vote (*Legislative Journal*, pp. 1896-1897).

Following the vote to override the governor’s veto, a petition drive started to place LB268 on the November 2016 ballot for a referendum vote. Nebraskans for the Death Penalty, a group supported by the governor, was able to gain enough signatures to prevent the law from going into effect and place the referendum on the November 2016 ballot, and the petition was certified by the Secretary of State on October 16, 2015 (Hammel 2015). Opposition to the

referendum was led by the group Nebraskans for Public Safety and would later include the group Retain a Just Nebraska (Hammel 2015). Legal challenges were raised against the petition, the most notable of which was heard by the Nebraska Supreme Court on May 25, 2016 (Duggan, May 26, 2016). This lawsuit dealt with the meaning of the word “sponsor” in a state law requiring a group collecting signatures for a referendum to disclose the names of any sponsors of the petition effort (Duggan, May 26, 2016). Governor Ricketts had given \$200,000 to Nebraskans for the Death Penalty in order to assist with their petition drive, but his name did not appear on the list of sponsors submitted with the petition (Duggan, May 26, 2016). On July, 9, 2016, the court announced its decision that Governor Ricketts’ name did not need to appear on the petition as a sponsor (Duggan, July 9, 2016). Citing a decision from 2003, the court decided that a “sponsor” is someone taking “statutory responsibilities” for a petition after it has been filed, and the governor did not meet that specification (Duggan, July 9, 2016). Thus, the referendum was allowed to appear on the November 2016 ballot. In November 2016, voters in Nebraska decided in Referendum 426 to repeal LB268 by a vote of 60.64% to 39.36%, allowing the death penalty to remain as a criminal punishment in Nebraska (Secretary of State, State of Nebraska 2016, p. 60, further *Official Reports*).

### **Theory and Literature Review**

The events in Nebraska and Washington are interesting in that politicians in both states had a notable lack of party unity on the death penalty. This suggests that the political actors in these situations could have been voting based on individual ideology rather than a party line, and it is also possible that legislators were casting their votes based on their perception of the opinion of their constituents. The pivotal politics model, proposed by Dr. Keith Krehbiel, provides a

framework for analyzing legislative voting based on legislator ideology. This framework can be used to examine the votes taken on the death penalty to determine if ideology can explain the observed intra-party disagreements. In addition, the votes of constituents on the death penalty can be compared to those of their elected legislators and compared to existing representation literature on how public opinion effects government policy change.

Given the available data, Nebraska will be the focus of the pivotal politics analysis in this paper. This model is based in part on the median voter theorem, which was first formalized by Duncan Black in his 1948 paper *On the Rationale of Group Decision-making*. This theorem makes observations on proposals offered under a majoritarian voting procedure. To set up the operation of the theorem, each voter (in this case, each legislator) is placed along a unidimensional liberal-conservative scale based on where that voter's ideal policy point lies. This theory relies on each legislator having a single-peaked ideal point on this continuum. Among options available on a given issue, each legislator will have their own preference ordering of these options based on where the options lie on the continuum compared to the legislator's ideal point. The main observation of this theorem is that whatever policy outcome is preferred by the median voter can gain a majority vote against any other proposal (Black 1948). Given a situation of multiple proposals, "only one motion can get a simple majority over every other" (Black 1948, p. 26). Therefore, when a vote on a proposal is taken, "the motion adopted... would be that corresponding to the median optimum" (Black 1948, p. 29). This theory is useful for this analysis, for it acts as a framework that is expanded by the pivotal politics model.

Applying the median voter theorem in a more direct manner, Krehbiel's pivotal politics theory models voting in a legislative setting. Legislators are placed on a liberal to conservative

unidimensional scale, ordered by their common-space ideal point scores. Similar to Black, this model relies on each legislator having a single-peaked ideal point on the continuum, meaning the goal of spatial comparisons among varying proposals is to determine which is closest to a given legislator's ideal point on the continuum (Krehbiel 1998, p. 22). The median voter can easily be identified in this model as the legislator whose place along the continuum is equal to one half of the total number of legislators in the chamber. Since Nebraska's legislature has 49 members, the senator in the twenty-fifth position moving left to right along the continuum would be the median voter.

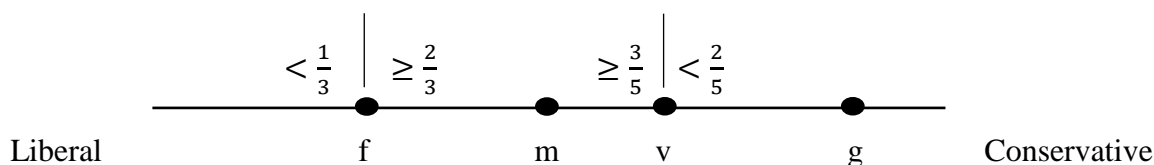
In addition to simply examining the median voter on the continuum, the pivotal politics theory adds several key "pivots" to the model that determine whether or not a proposal becomes law. The first pivotal vote to add to the model is the executive's position on the continuum. The executive, in this case the governor, determines the position of the other two pivotal votes on the continuum. Since Governor Ricketts is a conservative Republican, his ideal point will fall to the right of the median. Assuming all legislators vote according to their place along this continuum, the legislator who would cast a deciding vote on invoking cloture is the filibuster pivot (Krehbiel 1998, p. 23). The rules of the legislature require "a two-thirds majority of elected members" to invoke cloture, meaning thirty-three votes are required to invoke cloture (*Rules of the Nebraska Unicameral Legislature*, p. 52). With the governor falling to the right of the median senator and Republicans in the majority in the legislature, the filibuster pivot will fall to the left of the median voter on the continuum. Thus, the filibuster pivot will be the thirty-third voter on the continuum counting from right to left. The final pivotal vote on the continuum is the veto pivot. In Nebraska, a three-fifths majority of the legislature is required to override the veto of the governor, meaning thirty senators must vote in favor of overriding a veto for the bill to become



law (Nebraska State Constitution). The veto pivot falls on the same side of the median voter as the governor. This placement makes sense, as the coalition of overriding a conservative governor's veto would start with the senator furthest to the left on the continuum and continue moving right at least through the thirtieth senator's ideal point.

This model seeks to explain observed voting results in legislative settings and can even be used to predict future votes based on available information on where the proposals would fall on the spectrum. There are strong assumptions made in terms of the information available to each of the players on this continuum. Each of the legislators "know each other's preferences, understand who the pivotal voter is in any given setting, and adopt optimal strategies accordingly" (Krehbiel 1998, p. 25). Each legislator is seeking solely to maximize their utility in the voting process and will vote for the proposal that is closest to their ideal point. Applying this model to Nebraska yields the following framework (Based on Krehbiel 1998, p. 23):

**Figure 1**  
**Pivotal Politics in Nebraska**



In this framework, point "f" represents the filibuster pivot, the thirty-third senator from the right of the continuum. Point "m" represents the median voter who has the ideal point that is the median of the legislature. Point "v" represents the veto pivot, the thirtieth senator from the left of the continuum. Point "g" represents the governor's ideal point on the continuum.

Theoretically, the pivotal politics model would hold when there is weak party unity in government. There is reason to believe that this could be the case in Nebraska. The legislature is

officially non-partisan, and members are elected on a non-partisan ballot. The state parties are able to endorse candidates in elections, but the chamber itself remains non-partisan. It could be the case that in the Nebraska Legislature, there is not as much pressure to “toe the party line” as there is in partisan legislatures. This would lend itself to pivotal politics analysis, as senators’ votes would more accurately reflect their personal positions on issues rather than the party’s position on issues. In addition to operating as non-partisan, the legislature is also the country’s only unicameral state legislature. Senators in Nebraska do not have to anticipate or cater to the actions of another chamber, only the position of the governor. This also aids pivotal politics analysis, as it enables all of the relevant individuals to be modeled on a single, unidimensional continuum rather than two (one for each chamber of a bicameral legislature). Thus, Nebraska’s situation as a non-partisan, unicameral legislature lends itself to the pivotal politics model.

The final portion of the model is supporting its validity. The main test of the model relevant to this analysis is the gridlock zone, which Krehbiel states is the hypothesis with “the greatest direct theoretical importance” (Krehbiel 1998, p. 63). The gridlock zone occurs on the continuum between the veto pivot and the filibuster pivot, and the test of the gridlock zone is a test of the validity of these two pivots. The model dictates that if the current state of the law falls in this zone on the continuum, then there is no proposal to change that law that can pass and become law. Any proposal in this interval will either be filibustered by the filibuster pivot or vetoed by the governor, and the veto pivot would not vote for a proposal that takes the state of the law further from their ideal point. The gridlock zone hypothesis states that the placement of the veto and filibuster pivots along this continuum that explains legislative gridlock, not party politics or public mood (Krehbiel 1998, p. 63). The test of the gridlock hypothesis is the gridlock interval’s effect on legislative productivity in the U.S. Congress. Krehbiel pulls measures of

legislative productivity and data on congressional legislation from Cameron and Howell (1996) and *Congressional Quarterly Weekly Report* (Krehbiel 1998, p. 63). In the regression, Krehbiel controls for the gridlock interval, government regime change (changing from unified to divided or vice versa), and public mood, with mood broken down into activist mood, domestic policy mood, and tax mood (Krehbiel 1998, p. 70). Krehbiel finds that when testing the gridlock interval, public mood, and regime change hypotheses, the gridlock interval has a statistically significant negative effect on legislative productivity, and neither the public mood nor change in government regime have significant impacts (Krehbiel 1998, p. 70). These results would support application of this model to the Nebraska situation. Based on the results of the referendum, citizens in Nebraska are clearly in favor of maintaining the state's death penalty system. However, the moderate Republicans in the legislature still partnered with Democrats to pass LB268, and their ideal point scores in the pivotal politics model may explain why the legislature voted against the public mood in this instance.

Despite Krehbiel's findings, the statistical significance of the gridlock zone has not been supported by subsequent research, but a recent study by Gray and Jenkins (2017) has attempted a new kind of analysis regarding legislation related to the gridlock zone. Rather than examining all categories of laws passed by Congress, the authors propose separating bills into "ideological" and "non-ideological" categories based on content (Gray and Jenkins 2017, p. 12). The ideal points of the legislators come from DW-NOMINATE scores, and the laws examined in this paper are the "landmark" laws selected in Mayhew (2005) from the 80<sup>th</sup> through 113<sup>th</sup> Congresses (Gray and Jenkins 2017, pp. 5-7). The categories of laws coded as ideological in the analysis are economic, social, military, and international relations/action, and the social category includes bills relating to criminal law (Gray and Jenkins 2017, pp. 12-13). The non-ideological

category is the remainder of the “landmark” laws that do not fit into one of these four categories (Gray and Jenkins 2017, pp. 12-13). This OLS regression controls for the presence of united government, policy mood, GDP growth, war, and the gridlock interval as determined by the DW-NOMINATE scores (Gray and Jenkins 2017, p. 15). Gray and Jenkins find that on ideological votes, the gridlock interval has a statistically significant negative effect on legislative productivity (Gray and Jenkins 2017, p. 15). This result empirically supports the pivotal politics model. The authors argue that since the legislators are being aligned based on ideological scores, it would make theoretical sense that votes on ideological issues would be better described by the pivotal politics model (Gray and Jenkins 2017, pp. 24-25). They also note that using ideological scores for legislators while incorporating legislation that was non-ideological could be why previous studies had found little empirical support for the pivotal politics model (Gray and Jenkins, pp. 24-25). Gray and Jenkins’ results further support a pivotal politics analysis for Nebraska. The non-partisan nature of the legislature could create weaker party unity and make a vote on a death penalty bill more reflective of legislator ideology.

Another area of study that is of interest for both Nebraska and Washington is responsiveness of government to public opinion. Studying the federal government, Stimson, Mackuen, and Erikson (1995) examine the effect of public opinion on policy change, measuring the effect of public opinion liberalism on public policy liberalism. Comparing the four main decision-making entities in the federal government (president, House, Senate, Supreme Court), the researchers find the House of Representatives to be the most responsive to changes in public opinion, followed by the president, the Senate, and the Supreme Court (Stimson, Mackuen, and Erikson 2015). These results make theoretical sense, as House members are directly elected by the smallest constituencies, while Supreme Court justices are only answerable to the public

indirectly and only during the confirmation process. The House should be more responsive than the president, as the president is technically not elected by the electorate but rather the Electoral College, and it is possible to win the presidency without winning the popular vote. However, it is likely that these levels of responsiveness would all be increased for state governments including Nebraska and Washington. While the legislature could show similar responsiveness to Congress, the governor and state Supreme Court justices are likely to be more responsive than their federal counterparts. This is due to the fact that justices (in some states) and the governor are elected by a statewide popular vote rather than nominations to the U.S. Supreme Court or the Electoral College. This puts all of the branches in similar electoral situations and could make them more responsive to public opinion.

There are studies at the state level that have sought to measure policy responsiveness of state governments. A section of Page and Shapiro (1983) compares responsiveness of state governments, Congress, the president, and the courts. Their analysis indicated that of the policies analyzed, “state policies turned out to be congruent most often of all” (Page and Shapiro 1983, p. 183). Page and Shapiro attribute this to varying ideologies by state and to the fact that the issues examined in their data set were moral issues, capital punishment among them (Page and Shapiro 1983). Other studies have supported the conclusion that state governments are overall generally responsive to public opinion. There is an argument that could be made of reverse causality, where elite actors in the state government are able to manipulate public opinion in support of their favored policies. This would make it seem as if public opinion was informing government policy, allowing elite actors to justify the policy. Wright, Erikson, and McIver (1987) presented detailed findings on public policy and public opinion at the state level. The researchers find strong correlation between liberalism of public opinion and liberalism of state policy change

(Wright, Erikson, and McIver 1987, p. 989). In addition, the researchers use a two-stage least squares regression to test the possibility of reverse causality (Wright, Erikson, and McIver 1987, p. 992). The results of this regression indicate that it is public opinion that is affecting state policy change and that the relationship “is not seriously contaminated by the reverse process” (Wright, Erikson, and McIver 1987, p. 993).

In terms of public opinion surrounding elections, there is a question of whether elite decision makers are able to anticipate what issues will be salient at the time of the next election. This is dependent on their ability to gauge and track changes in public opinion. For example, legislators in Nebraska knew that Governor Ricketts planned on vetoing LB268, but it was unclear whether they knew that a referendum election was likely to occur. Much of the research suggests that as policy salience increases the effect of public opinion on policy increases, so it is possible that lawmakers might have underestimated the salience that the referendum would have on Election Day one and a half years after the veto was overridden. There was some reporting on override votes against the governor were hurting some Republican senators during their primary campaigns. Overrides on the death penalty, tax reform, and licenses for child immigrants seemed to affect the primary election margins for certain Republican senators who voted against the governor on these issues (Stoddard 2016). One incumbent Republican, Senator Nicole Fox, lost her primary election, although she was not appointed to the legislature until August 2015 and thus did not vote on LB268 (Stoddard 2016). It is possible that the legislature’s non-partisan status was not enough to shield incumbents from constituents who supported the governor’s position on the death penalty.

It would be difficult to measure responsiveness and representation as these studies do. There are simply not enough polling data available at the state level that specifically seeks to

measure support for the death penalty. Much of the information is available in national polls from organizations like Gallup. The most direct way that voters express their opinion on government is through voting. A direct way to compare how the legislator voted and how the citizens in the district fall along the spectrum on the death penalty is to look at the election returns for the counties in each senator's district. A comparison could then be made between how the senator voted on LB268 and how the constituents feel the senator should have voted on LB268. Vote choice is also the basis for the common-space ideal point scores. Thus, it may be possible to analyze ideal point scores for the districts that each senator represents and scale them just like the ideal point scores for the legislators. This would allow for comparisons between the ideology of the legislators and the ideology of their districts. The ideological scores for the districts can also be placed on a continuum to see how well these scores align with the election results from each district.

## **Washington**

### *Data*

The analysis for Washington is mainly qualitative, drawing from both legislative records and newspaper reports. The daily legislative journals of both the Washington House and Senate were accessed online through the Ohio State University Library. The news archives of the *Seattle Times* were used to provide context of the debate surrounding Initiative 316. In terms of the pivotal politics model, ideology scores are not available for the session in 1975. In addition, the election returns available from the Washington Secretary of State are not available at the district or precinct level, preventing a comparison of the district results on Initiative 316 to the respective senator and representative votes on the bills in the legislature. However, the legislative journals

do contain records of the roll call votes on each of the bills. Since the districts and constituencies for the House and the Senate are the same, the votes of the legislators representing the same districts can be compared. This could reveal differences between senators and representatives in gauging public opinion and can be compared to the literature on representation.

### *Analysis*

The vote on SB2007 in the Washington Senate does not appear to have been a party-influenced vote. Of the Democrats in the Senate, 18 voted in favor and 10 voted against, and of the Republicans in the Senate, 15 voted in favor and four voted against. The vote in the House to refer SB2007 back to the Committee on Rules followed a more partisan line. Among Democrats in the House, 50 voted in favor of referral and 10 voted against, and among Republicans in the House, eight voted in favor while 27 voted against. The lack of district or precinct level returns on Initiative 316 prevents the comparison of the votes of the legislators to those of their districts. However, given the structure of the Washington Legislature, it is possible to compare the votes of representatives and senators who represent the same districts. Table 3 displays the votes on SB2007 of both the representatives and senators from each district, and comparing these votes can help reveal differences in ideology among legislators representing the same districts but in different chambers of the legislature:

**Table 3**  
**Washington Senate and House Votes on SB2007**

District	Senator	Vote on SB2007	Rep. 1	Vote to Refer SB2007	Rep. 2	Vote to Refer SB2007
1	Van Hollebeke	N	Bender	N	Brown	Y
2	Bottinger	Y	Ehlers	Y	Erickson	Y
3	Keefe	Y	M. Hurley	N	May	N
4	Day	Y	Knowles	N	Kuehnle	N
5	R. Lewis	Y	Luders	N	McCormick	Y



6	Guess	Y	Bond	N	Pardini	N
7	Wilson	N	Haussler	Y	Schumaker	N
8	Benitz	Y	Boldt	Y	Cochrane	Y
9	Donohue	Y	Amen	Y	Patterson	N
10	Wanamaker	Y	Fortson	N	Wilson	Y
11	Grant	N	Bagnariol	N	Shinpoch	Y
12	Sellar	Y	Curtis	N	Tilly	N
13	Washington	N	Flanagan	Y	Hansen	NV
14	Matson	E	Seeberger	Y	Whiteside	N
15	Morrison	Y	Deccio	NV	Newhouse	N
16	Jolly	Y	Hayner	N	Kilbury	N
17	Henry	Y	Laughlin	Y	Zimmerman	Y
18	Talley	Y	Paris	Y	Thompson	Y
19	Bailey	Y	Charette	Y	E.P. Smith	Y
20	Odegard	N	Jastad	Y	Kalich	Y
21	Gould	N	Fischer	Y	Nelson	N
22	H. Lewis	Y	Bausch	Y	Hendricks	N
23	Walgren	Y	Randall	Y	R. Smith	Y
24	Sandison	Y	Conner	Y	Savage	Y
25	Knoblauch	Y	Gaspard	Y	Sawyer	Y
26	Beck	Y	Hanna	Y	Hawkins	Y
27	Stortini	Y	Adams	Y	Wojahn	Y
28	Newschwander	Y	Haley	N	Jueling	N
29	Rasmussen	Y	Gallagher	Y	Parker	Y
30	von Reichbauer	Y	Gaines	Y	Warnke	Y
31	Herr	N	Lysen	N	Valle	Y
32	Francis	Y	Perry	Y	Williams	Y
33	Cunningham	N	Barnes	N	Lee	N
34	Buffington	Y	Ceccarelli	Y	Leckenby	N
35	Ridder	N	Chatalas	NV	O'Brien	Y
36	Murray	N	Eikenberry	N	Sommers	Y
37	Fleming	N	Eng	Y	Maxie	Y
38	Mardesich	Y	King	Y	Martinis	Y
39	Woody	E	Clemente	Y	Moon	Y
40	Peterson	Y	Berenston	N	Hansey	N
41	Clarke	Y	Dunlap	N	Polk	N
42	Goltz	N	Becker	Y	Moreau	Y
43	McDermott	N	Douthwaite	Y	Peterson	N
44	North	Y	Charnley	Y	G. Hurley	Y
45	Bluechel	N	Chandler	Y	Matthews	N
46	Scott	Y	Blair	Y	Greengo	N
47	Pullen	Y	North	Y	Sherman	Y
48	Jones	Y	Freeman	N	Gilleland	N
49	Marsh	Y	Bauer	N	McKibbin	Y

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Sources: *Senate Journal*, pp. 1008-1015; *House Journal*, p. 1357

Given the nature of the votes in each chamber, a “no” vote on passage in the Senate and a “yes” vote to refer the bill in the House are both equivalent to voting against the bill and against the death penalty. Conversely, a “yes” vote on passage in the Senate and a “no” vote on referral in the House are both equivalent to voting in favor of the bill and in favor of the death penalty. Within the House, both representatives from the same district cast the same votes on SB2007 for 30 of the 49 legislative districts. When the Senate is included, the number drops significantly. Both representatives and the senator from a district cast parallel votes in only 12 of the 49 districts. Only three of these 12 districts had legislators from different parties, and those were districts four, 16, and 40. This suggests possible differences among legislators from the same district over ideology or over the opinion of their constituents on the death penalty.

Numerous opinions were given by various individuals and groups in Washington regarding both the proposed bills to reinstate the death penalty and Initiative 316. As noted earlier, Governor Evans was an opponent of the death penalty and threatened to veto any bills reinstating the death penalty. In March 1975, the governor made his opposition to the bills clear by arguing that the death penalty was not a deterrent to crime and arguing that if the legislature was serious about the death penalty, then the bills should have included provisions to force a legislative vote on each application of the death penalty in criminal cases (Anderson, 1975). In addition to the governor, state Attorney General Slade Gorton also opposed the legislature’s proposals. Gorton urged the legislature to await guidance from the Supreme Court regarding constitutional procedures for the death penalty, and he states that the money spent on death penalty appeals would be better spent on more effective law enforcement as a deterrent to crime (AP, March 21, 1975). The Washington Chapter of the ACLU also cited the absence of evidence of a deterrent effect, opposing both the legislative bills and the push for the initiative (AP, March

19, 1975). Some religious organizations voiced opinions on Initiative 316, with the Quakers in the state opposing the initiative citing moral objections and lack of a deterrent effect (AP, October 19, 1975). However, the Puget Sound Baptist Association supported the initiative, believing the government should have the authority to impose death as a punishment for crime (AP, October 29, 1975). The *Seattle Times* itself urged passage of Initiative 316, arguing it was a way for the electorate to force the government to action on rising crime in the state (Editorial Board of *The Seattle Times*, 1975). Despite the numerous individuals and groups against Initiative 316, the crime control argument seemed more persuasive with voters on Election Day as they voted to overrule their state House of Representatives and reinstate the death penalty in Washington.

## **Nebraska**

### *Data*

Data on LB268 and Referendum 426 came from several sources. Procedural information on the bill, such as roll call votes and the governor's veto message, are available in the legislature website in the *Legislative Journal*. Articles from the *Omaha World Herald* were also used to provide background and context. Voting data for state legislative elections and Referendum 426 can be found in the *Revised Official Reports of the Board of State* as well as on the Nebraska Secretary of State's website (Nebraska Secretary of State-Election Results, 2016). The Secretary of State's website reports the election results in both county and precinct level format. With a list of precincts in each legislative district provided by the Secretary of State's Office, it was possible to determine how each of the legislative districts in Nebraska voted in

Referendum 426. These data can be used to compare the votes taken by the legislators on LB268 and their constituents' votes in the referendum, allowing for inferences regarding representation.

In order to form a pivotal politics analysis, a measure of legislator ideology was necessary to determine the rank order of the legislators on the continuum. Certain interest groups release legislator scorecards that list how often legislators' votes align with the values of the interest group. Of the available scores for Nebraska legislators, the American Conservative Union (ACU) provided voting histories on selected bills that are most likely to reveal conservative to liberal voting behavior among legislators (ACU 2015). The percentage of conservative to liberal voting behavior reported on the ACU's yearly scorecards provides the rank order for the Nebraska Legislature used in this analysis.

Similar to the rank order provided by the ACU scorecards for state legislators, ideological measures can be used to estimate the ideology of a particular legislative district. Dr. Chris Tausanovitch and Dr. Christopher Warshaw have used responses to the Cooperative Congressional Election Survey to estimate the scaled ideology of both congressional and state legislative districts (Tausanovitch and Warshaw 2013). Condensing the surveys into a "roll-call matrix," the researchers scale responses into ideal points ranging from  $[-1,1]$ , where a score of -1 represents the liberal end of the spectrum and a score of 1 represents the conservative end of the spectrum (Tausanovitch and Warshaw 2013). These data were updated for state legislatures following redistricting after the 2010 census, and the data are reported on the American Ideology Project website. The ideal point scores for each of the state legislative districts in Nebraska can be used not only as a tool for a pivotal politics analysis but also as a method to gauge how responsive legislators were to the perceived interests of their constituencies.

### *Analysis*

The roll call votes on LB268 and the override vote indicate weak party unity among Republicans in Nebraska on the issue of the death penalty. Both of these votes involved a bipartisan coalition of senators, and 18 of the 35 Republicans in the legislature in 2015 voted in favor of LB268. Only 16 of the 35 would vote in favor of the override, as Senators Johnson and Murante voted against the override after voting for LB268's initial passage. While the votes show unanimity among the Democratic caucus in the legislature, the evident disagreement among Republicans on repealing the death penalty and overriding the governor shows that political parties were not voting bloc coalitions on this vote. It is more likely, as the following tables will show, that the vote can be explained by the senators' ideology rather than their party identifications. There were four sets of scores available from the ACU for the 104<sup>th</sup> Nebraska Legislature. Each year, the reports from the ACU list the legislators' scores for selected bills and amendments voted on in that calendar year. In addition to the yearly score, each report also lists the running lifetime averages for each legislator aggregated across the yearly reports. In a legislator's first year of service, the yearly score and lifetime average would be the same. The 104<sup>th</sup> Nebraska Legislature opened in 2015 and adjourned in 2016, with the ACU report for each year listing the yearly score as well as the running lifetime averages. Of the four available scores, the most accurate representation of the pivotal politics model came from the 2015 yearly score.

Table 4 displays the rank order of senators from liberal to conservative based on the ACU 2015 report:

**Table 4**  
**Nebraska Pivotal Politics Table**

<b>Rank</b>	<b>Senator (score)</b>	<b>Vote on LB268</b>	<b>Vote on override</b>
1	Haar (0)	Y	Y

2	Hansen	(0)	Y	Y
3	Kolowski	(0)	Y	Y
4	Mello	(0)	Y	Y
5	Nordquist	(0)	Y	Y
6	Pansing Brooks	(0)	Y	Y
7	Cook	(7)	Y	Y
8	Harr	(7)	Y	Y
9	Morfeld	(7)	Y	Y
10	Bolz	(8)	Y	Y
11	Campbell	(8)	Y	Y
12	Krist	(8)	Y	Y
13	Howard	(9)	Y	Y
14	Chambers	(13)	Y	Y
15	Crawford	(13)	Y	Y
16	McCollister	(14)	Y	Y
17	Baker (F)	(20)	Y	Y
18	Hadley	(20)	Y	Y
19	Johnson	(20)	Y	N
20	Schumacher	(20)	Y	Y
21	Gloor	(21)	Y	Y
22	Seiler	(21)	Y	Y
23	Kuehn	(23)	N	N
24	Davis	(27)	Y	Y
25	Sullivan (M)	(27)	Y	Y
26	Scheer	(29)	N	N
27	Coash (M*)	(33)	Y	Y
28	Smith	(33)	N	N
29	Stinner	(33)	N	N
30	Friesen (V)	(38)	N	N
31	Hilkemann	(40)	Y	Y
32	Kolterman	(42)	Y	Y
33	Williams	(43)	Y	Y
34	Schilz	(45)	P	N
35	Garrett	(53)	Y	Y
36	Hughes	(54)	N	N
37	Craighead	(57)	N	N
38	Lindstrom	(64)	Y	Y
39	Riepe	(64)	N	N
40	Watermeier	(70)	N	N
41	Ebke (V*)	(71)	Y	Y
42	Larson	(73)	P	N
43	Murante	(75)	Y	N
44	Bloomfield	(79)	N	N
45	Brasch	(79)	N	N
46	Groene	(87)	N	N

47	Kintner	(87)	N	N
48	Schnoor	(91)	N	N
49	McCoy	(92)	N	N

Note: The governor's score for 2015 was 44%.

Sources: ACU 2015; *Legislative Journal*, p. 1739 and pp. 1896-1897

The senator scores represent the percentage of times the senator voted with the ACU position on the selected bills and amendments in the ACU 2015 report. Next to the senator names are both the expected pivots, denoted in bold, and the actual pivots, denoted in bold with an asterisk. The governor's score, listed below the table, was calculated using the governor's decision to sign or veto the bills selected in the ACU 2015 report that passed the legislature. The final two columns, containing the vote on LB268 and the vote to override the governor's veto, are the measure of the accuracy of the model. The senators are ranked top to bottom in the table from liberal to conservative. This model assumes that voting would occur beginning with the most liberal senator and continue in order with the most conservative senator voting last. If the pivotal politics model was an exact explanation of the votes in Nebraska, all of the "yes" votes would appear in order beginning at the top of the table, followed by all of the "no" votes. This setup would lead to Senator Sullivan being the median voter on LB268 as denoted on the table. As the 25th senator in rank order, Sullivan would be the final vote needed for the initial passage of LB268 if all senators above would have voted "yes." The two "present" votes on LB268 would be irrelevant in this scenario as long as they did not occur before Sullivan's vote. In addition, under this hypothetical example, the 30 votes to override the governor's veto would be the 30 votes beginning with the most liberal an ending with the senator in rank order position 30. This would make Senator Friesen the expected veto pivot as denoted in the table.

It is clear in the Table 4 that the pivotal politics model using the ACU's 2015 scores is not a perfect explanation of the votes in the legislature. However, the model does accurately account for a large portion of the votes cast, especially on LB268. An "error" in this case would

be defined as a senator with the opportunity to act as a “pivot” in the voting order declining to do so and passing the opportunity to the next senator. In the vote on LB268, Sullivan is the hypothesized median voter. However, Senator Kuehn’s “no” vote prevented Sullivan from casting the 25<sup>th</sup> vote required for passage. This passed the opportunity to Senator Scheer, who declined to pivot and voted “no” on LB268. It was Senator Coash who cast the deciding 25<sup>th</sup> vote on LB268, making him the actual median voter on LB268. Since two senators declined to pivot and Coash is two spots away from the hypothesized median position, this model has two errors for LB268. The vote to override the governor’s veto is a less accurately modeled in the table. Five “no” votes occur in the table before the hypothesized veto pivot, preventing Friesen from pivoting. By voting “no,” Friesen would have declined to pivot even if given the opportunity. After three more out of place “no” votes, the first senator that had the opportunity to pivot was Senator Riepe. Riepe declined to pivot, as did Senator Watermeier. Senator Ebke cast the deciding 30<sup>th</sup> vote, making Ebke the actual veto pivot for the override vote. Since 11 “no” votes were cast before Ebke, the model for the override vote contains 11 errors. For comparison, the yearly scores for 2016 contained three errors for the vote on LB268 and 10 errors to override the governor’s veto. Interestingly, when averaging the 2015 and 2016 yearly scores, only one error is present for the vote on LB268 and only eight errors are present for the vote to override the governor’s veto.

As seen in the results of Referendum 426, a majority of voters in Nebraska disagreed with the legislature’s decision and repealed LB268. Table 5 displays the votes of each senator on LB268, the votes of each senator on the vote to override, and the results of the referendum in each senator’s district:



**Table 5**  
**Nebraska Senator Votes on LB268 and District Results**

District	Senator	Vote on LB268	Vote on Override	District Result
1	Watermeier	N	N	Repeal
2	Kintner	N	N	Repeal
3	Garrett	Y	Y	Repeal
4	Hilkemann	Y	Y	Repeal
5	Mello	Y	Y	Repeal
6	Craighead	N	N	Retain
7	Nordquist	Y	Y	Retain
8	Harr	Y	Y	Retain
9	Howard	Y	Y	Retain
10	Krist	Y	Y	Repeal
11	Chambers	Y	Y	Retain
12	Riepe	N	N	Repeal
13	Cook	Y	Y	Retain
14	Smith	N	N	Repeal
15	Schnoor	N	N	Repeal
16	Brasch	N	N	Repeal
17	Bloomfield	N	N	Repeal
18	Lindstrom	Y	Y	Repeal
19	Scheer	N	N	Repeal
20	McCollister	Y	Y	Repeal
21	Haar	Y	Y	Repeal
22	Schumacher	Y	Y	Repeal
23	Johnson	Y	N	Repeal
24	Kolterman	Y	Y	Repeal
25	Campbell	Y	Y	Retain
26	Hansen	Y	Y	Repeal
27	Coash	Y	Y	Retain
28	Pansing Brooks	Y	Y	Retain
29	Bolz	Y	Y	Retain
30	Baker	Y	Y	Repeal
31	Kolowski	Y	Y	Repeal
32	Ebke	Y	Y	Repeal
33	Seiler	Y	Y	Repeal
34	Friesen	N	N	Repeal
35	Gloor	Y	Y	Repeal
36	Williams	Y	Y	Repeal
37	Hadley	Y	Y	Repeal
38	Kuehn	N	N	Repeal
39	McCoy	N	N	Repeal
40	Larson	P	N	Repeal

41	Sullivan	Y	Y	Repeal
42	Groene	N	N	Repeal
43	Davis	Y	Y	Repeal
44	Hughes	N	N	Repeal
45	Crawford	Y	Y	Repeal
46	Morfeld	Y	Y	Retain
47	Schilz	P	N	Repeal
48	Stinner	N	N	Repeal
49	Murante	Y	N	Repeal

Sources: *Legislative Journal*, p. 1739 and pp. 1896-1897; Nebraska Secretary of State-Election Results, 2016

This table shows that 24 of the senators cast at least one vote that differed from the referendum result in their districts. Two of the senators, Johnson and Murante, voted “yes” on LB268 and switched their votes to “no” on the decision to override the governor’s veto. Both of their districts voted to repeal LB268, so their reversal on the vote to override aligned them with the votes of their constituents. It is possible that the votes of some legislators on LB268 hurt them in their reelection bids in 2016. While the public may have forgotten about votes taken on LB268 in May 2015 by the time of the November 2016 election, Referendum 426 kept the issue of the death penalty and LB268 salient throughout the election cycle. Table 6 displays the 13 incumbents who ran for re-election in Nebraska in 2016:

**Table 6**  
**Nebraska Senator Votes, District Results, and Re-Election Results**

District	Senator	Party	Vote on LB268	Vote on Override	District Result	Re-Election Result
1	Watermeier	R	N	N	Repeal	Won (Unopposed)
3	Garrett	R	Y	Y	Repeal	Lost
9	Howard	D	Y	Y	Retain	Won
11	Chambers	I	Y	Y	Retain	Won
15	Schnoor	R	N	N	Repeal	Lost
19	Scheer	R	N	N	Repeal	Won (Unopposed)
23	Johnson	R	Y	N	Repeal	Lost
29	Bolz	D	Y	Y	Retain	Won
31	Kolowski	D	Y	Y	Repeal	Won
33	Seiler	R	Y	Y	Repeal	Lost
43	Davis	R	Y	Y	Repeal	Lost
45	Crawford	D	Y	Y	Repeal	Won

49            Murante            R            Y            N            Repeal            Won (Unopposed)  
 Sources: *Legislative Journal*, p. 1739 and pp. 1896-1897; Nebraska Secretary of State-Election Results, 2016;  
*Official Reports*

Of the five incumbents that lost their re-election bids, three cast both votes that were not aligned with the referendum results in their districts. Senator Schnoor cast both votes in alignment with the referendum results in District 15 but still lost reelection. Senator Johnson changing his vote to “no” on the vote to override aligned with the referendum results in District 23, but he still lost his reelection campaign. However, Senator Murante similarly switched to “no” on the vote to override and won reelection, albeit unopposed. Interestingly, Senators Crawford and Kolowski both won reelection despite casting both votes on LB268 and the vote to override opposite of the referendum results in their districts. The results shown in Table 6 indicate that despite the presence of Referendum 426 on the ballot, the senators’ votes on LB268 did not seem to have a major impact in the district races.

With scores available from the American Ideology Project to rank the ideology of each district based on survey responses of voters, it is possible to compare the rank order of the senators with the rank order of their districts based on their respective scores. Table 7 shows the comparison between each district’s rank order and the respective senator’s rank order:

**Table 7**  
**Ideological Rank Order of Senators and Districts (Liberal to Conservative)**

<b>District</b>	<b>Senator Rank</b>	<b>District Rank</b>
1	40	38
2	47	13
3	35	41
4	31	8
5	4	20
6	37	1
7	5	9
8	8	7
9	13	10
10	12	29

11	14	2
12	39	24
13	7	19
14	28	42
15	48	33
16	45	23
17	44	45
18	38	25
19	26	37
20	16	32
21	1	21
22	20	47
23	19	28
24	32	34
25	11	12
26	2	31
27	27	11
28	6	5
29	10	4
30	17	26
31	3	39
32	41	36
33	22	40
34	30	48
35	21	22
36	33	44
37	18	18
38	23	43
39	49	27
40	42	49
41	25	30
42	46	35
43	24	16
44	36	46
45	15	14
46	9	3
47	34	15
48	29	17
49	43	6

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Sources: ACU 2015; Tausanovitch and Warshaw 2013

Only one district, district 37, has both the senator and the district rank order equal. The average distance between the senator and district ranks is just over 13 with a correlation of 0.325, but it is

possible that this overstates differences in ideology among the senators and their districts. The surveys used to construct the scores for each district all had samples of less than 60 participants. However, when analyzing the referendum results, it appears that these district ideal point scores may be an accurate description of each district's position on LB268. Table 8 ranks each district on the same liberal to conservative spectrum as the senators are ranked in Table 4:

**Table 8**  
**Ideological Rank Order of Districts and Referendum Results**

<b>Rank</b>	<b>District</b>	<b>District Result</b>
1	6	Retain
2	11	Retain
3	46	Retain
4	29	Retain
5	28	Retain
6	49	Repeal
7	8	Retain
8	4	Repeal
9	7	Retain
10	9	Retain
11	27	Retain
12	25	Retain
13	2	Repeal
14	45	Repeal
15	47	Repeal
16	43	Repeal
17	48	Repeal
18	37	Repeal
19	13	Retain
20	5	Repeal
21	21	Repeal
22	35	Repeal
23	16	Repeal
24	12	Repeal
25	18	Repeal
26	30	Repeal
27	39	Repeal
28	23	Repeal
29	10	Repeal
30	41	Repeal

31	26	Repeal
32	20	Repeal
33	15	Repeal
34	24	Repeal
35	42	Repeal
36	32	Repeal
37	19	Repeal
38	1	Repeal
39	31	Repeal
40	33	Repeal
41	3	Repeal
42	14	Repeal
43	38	Repeal
44	36	Repeal
45	17	Repeal
46	44	Repeal
47	22	Repeal
48	34	Repeal
49	40	Repeal

Sources: Tausanovitch and Warshaw 2013; Nebraska Secretary of State-Election Results, 2016

A vote to “Retain” LB268 would be considered a liberal position, and a vote to “Repeal” LB268 would be considered a conservative position. This table is a fairly accurate representation of the expected alignment of “Repeal” and “Retain” votes based on the rank of ideology, with only three votes appearing to be outliers. These would be the “Retain” result in District 13 and the “Repeal” results in Districts 4 and 49. This table suggests that, at least on the issue of the death penalty and LB268, these district ideal point scores are fairly accurate in representing each district’s position.

### **Discussion of Results**

The votes in the Nebraska and Washington legislatures as well as the pivotal politics table for Nebraska suggest that the votes on the death penalty bills in both states were based on ideology rather than party platforms or constituent opinion. In Washington, the voting roll calls in the House and the Senate do not indicate a party-line vote on SB2007. In addition, the

Republican caucus in the Senate voted to pass SB2007 while the Republican caucus in the House voted against allowing SB2007 to proceed on the floor. A similar dynamic can be found in Nebraska, where the Republican governor and Republican-majority legislature disagreed on LB268. These situations indicate weak party unity on the issue of the death penalty and a lack of influence of the state parties over the votes. In addition to weak party voting, the legislators' votes do not appear to have been based on public opinion in their constituencies. This is most evident in the results of the ballot Initiative 316 in Washington and Referendum 426 in Nebraska.

Ideology, then, was likely an influential factor in the votes on SB2007 and LB268. This can be seen in Table 4 containing the pivotal politics analysis. With only two errors, this is a fairly accurate model of the initial vote on LB268 and supports ideology as a main factor in the decision of the legislators. The vote to override the governor's veto, however, is less accurately modeled in Table 4. The override vote model contains eleven errors, and this is likely due to the five additional senators required to override a veto in Nebraska compared to passing the original bill. The additional votes leave more room for errors to occur, and it seems that the model is less accurate at accounting for votes on the conservative half of the spectrum. There were also four additional "no" votes on the override vote than on the original passage vote, with two senators switching their votes from "yes" on original passage to "no" on the vote to override and two senators switching their votes from "present" on original passage to "no" on the vote to override. Despite the larger number of errors for the vote to override, the small number of errors on the original vote on LB268 combined with the intra-party disagreement in both Nebraska and Washington indicate that ideology was a main factor in determining state death penalty policy. Thus, the first main conclusion of the analysis is that ideology was a main factor in determining

the votes of legislators on SB2007 and LB268. This result supports the pivotal politics model, as the process for explaining the vote on LB268 in Nebraska was fairly accurate.

As mentioned above, the passage of Initiative 316 and the “repeal” result in Referendum 426 indicate that constituents disagreed with the results of the legislative action on the death penalty. Table 5 displaying the results of Referendum 426 in each district compared to the senators’ votes on LB268 further illustrates this point. With almost half of the senators casting votes incongruent with the results in their districts, it seems that constituent opinion on the death penalty was secondary to ideological differences among policymakers. The second main conclusion from the analysis is that there is clear incongruence between constituent and legislator opinions on the death penalty, and these differences were significant enough to cause citizens to use the ballot question elections to overrule the legislature on the death penalty.

This result and the situations in Nebraska and Washington seem to contradict the findings of Stimson et al. and Erikson et al. in terms of responsiveness of government entities to public opinion. In Washington, it was the state Senate that voted congruently with public opinion as expressed in the initiative results, while the state House and governor both held the position opposite the majority of voters. In addition, it was the governor rather than the legislature in Nebraska that held the position of a majority of voters. However, the unique nature of both legislatures likely makes comparison to the two studies questionable. The fact that senators and representatives in Washington share the same legislative districts as well as the fact that each district has two representatives in the state House makes the Washington legislature significantly different from the structure of the U.S. Congress studied in Stimson et al. In addition, the unicameral nature of Nebraska’s legislature is also different from Congress, and these differences make comparison with the Stimson study hard to support.



An unexpected result of this analysis was the indication from Table 7 that notable ideological differences existed in Nebraska between the senators and the districts they represent. However, this is also a questionable observation given the possible inaccuracy of the ideology scores for the districts and senators. The scores for each are based on different criteria, as the district scores are based on survey responses and the senator scores are based on legislative voting records. In addition, while Tables 4 and 8 support the accuracy of each set of scores in determining the voting order, this does not mean that a comparison between the scores would be accurate. For example, the votes of the districts by ideology in Table 8 may correctly show the more liberal districts voting to retain LB268 and the more conservative districts voting to repeal LB268, but the number of districts voting to repeal the law could hide errors in the rank order of these districts. In addition, in Table 4, the number of more liberal senators voting “yes” on LB268 could hide inaccuracies in the rank order of these senators. Possible inaccuracies are even more likely given the fact that some legislators have the same ACU percentage score but still must have different numerical rankings. Given these potential inaccuracies, the implications of Table 7 are questionable.

The two main conclusions of this analysis have implications for state death penalty policy. Weak party unity on ideological issues such as the death penalty make can make state parties ineffective influencers of legislative votes, and weak party unity can also inhibit governors who may want to influence the vote of legislators of their own party. As seen in Nebraska, depending on the overall ideology of the legislature compared to the governor, it is possible for a legislature to limit the governor’s influence as an institutional actor on death penalty policy. In addition, there are also implications for current death penalty states where legislators may want to abolish capital punishment. In states where there are referendum and

initiative processes available to citizens, it will be difficult for legislators to abolish the death penalty absent strong constituent support for the death penalty. However, it can be hard for legislators to anticipate the reaction of constituents to death penalty laws without state-level public opinion polls. This problem is not unique to death penalty laws, but without knowledge of public opinion on the issue, it can make it difficult for legislators to make major ideological changes to the state laws. Direct democracy options enable citizens to overrule state legislative action, and bills could also fail to pass if legislators are unwilling to vote for major policy changes if they are unsure of how constituents will react. Thus, the two conclusions of this analysis give some insight into the challenges of ideological lawmaking at the state level.

## **Conclusion**

In Nebraska and Washington, the voters were clearly the most influential actors in determining state law on the death penalty in these cases. This analysis suggests that ideology can fairly accurately explain the intra-party differences observed over state death penalty policy in Nebraska and Washington. While this analysis supports the pivotal politics model, this analysis does show that the vote to override the veto in Nebraska is less accurately explained by ideology. This suggests that factors besides ideology had a greater role in the vote to override the governor's veto than on the vote to originally pass LB268. The comparison of the referendum results to the votes in the legislature suggest that the actions of the legislature were incongruent with public opinion, something that may have been difficult for the legislators to foresee. For states that have direct democracy options such as referendum and initiative elections, citizens rather than the legislature or governor seem, from these two cases, to hold the greatest influence over state death penalty policy. Thus, it will be difficult for a legislature in these states to abolish

the death penalty without major public support, regardless of what the partisan balance of government happens to be. While each state's structure of government and aspects of direct democracy may differ, the death penalty will remain an ideologically contentious issue that will be debated in all three branches of government as well as the court of public opinion.

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